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Supreme Court of the United States

OCTOBER TERM, 1963

No. 383

IAN WOODNER,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit announced in its decision of May 28, 1963, in this case.

Opinion Below

The opinion of the Court below (Appendix, *infra*, pages 1a-6a) is reported at 317 F. 2d 649.

Jurisdiction

The judgment of conviction of the petitioner was unanimously affirmed by the Court of Appeals in its decision of May 28, 1963; petitioner's petition for rehearing was denied on June 18, 1963, and a stay of the mandate was granted pursuant to Rule 28(c) of that Court and bail was

continued pursuant to Rule 46(a)(2) of the Rules of Criminal Procedure (Appendix, *infra*, pages 12a-14a). An order was signed by Mr. Justice HARLAN extending the time to file a petition for a writ of certiorari until August 17, 1963. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Questions Presented

1. Whether it is a violation of Rule 24(a) and Rule 43 of the Federal Rules of Criminal Procedure and the rights of a defendant to an impartial jury under the Sixth Amendment for the court to examine in private a sworn juror during the trial and to examine in private prospective jurors during the process of selecting jurors for the trial of the petitioner to determine whether they should be excused for hardship, possible bias or like grounds.

2. Whether the Statute, 28 U. S. C. A. Section 753, requiring recording of all proceedings in criminal cases had in open court, including the impaneling of a jury, is mandatory, and the court has the duty to require compliance therewith and no rule or practice can override the requirement.

3. Whether unavailability of a full transcript because of the failure of the court reporter to record private conversations of the Trial Court with prospective jurors while the jury was being selected, concerning their ability and qualifications to serve, over objection, was necessarily prejudicial and, therefore, requires a reversal and a remand of the case.

4. Whether in circumstances where it is material to a defense of a criminal action, failure of the Government to produce on demand information returns 1099 and 1096, or to disclose that such returns were not filed constituted a denial of due process under the Fifth Amendment and principles announced by this Court for the fair administration of criminal trials in federal courts.

5. Whether an instruction to the jury ascribing greater weight to circumstantial than direct evidence undermines

a general instruction on the presumption of innocence and reasonable doubt and being contrary to a decision of this Court in *Holland v. United States*, requires a reversal and remand of the case.

Statutes Involved

The provisions of 62 Stat. 952, 28 U. S. C. 1864 which provides the method by which juries are to be selected in Federal courts and the pertinent provisions of 62 Stat. 922, 28 U. S. C. Sec. 753(b) known as the Court Reporters Act and the pertinent provisions of 62 Stat. 952, 28 U. S. C. 1863, and the provisions of Rules 24(a) and 43 of the Federal Rules of Criminal Procedure are all set forth in the Appendix, *infra*, pages 7a-10a.

Statement

A. The Indictments and the Proceedings Below.

Petitioner was indicted in two indictments which were consolidated for trial. He was accused on four counts of criminal tax evasion under Section 145(b) of the Internal Revenue Code of 1939 in respect of his personal income taxes for the years 1950, 1951, 1952 and 1953. The case was tried twice before the same judge and a jury; both were protracted trials of about five weeks duration. In the first trial held in 1961 the jury disagreed as to all four counts and in the second, almost a year later, the jury found the defendant guilty on two counts involving the years 1952 and 1953 and were unable to agree on the other two counts.

For the years 1952 and 1953 the Government's claims relate to only one item or category of alleged unreported income. The second indictment involves the claim that the petitioner reported no tax due for the year 1952 whereas there was owing to the United States an income tax of $1,012.91 and for 1953 in the third count it was claimed that the petitioner reported a net income for the calendar year of $2,348.05, whereas his income was $13,115.50 upon which

there was owing an income tax of $2,962.42. Thus the total amount of tax involved in the charges for which the petitioner was convicted of a felony was less than $4,000 (R7568-73; 7591; D2a-3a, 28a-29a).*

The sentence was two and one-half years imprisonment on each count to run concurrently, a $10,000 fine on each and payment of one-half of the cost of prosecution (R7591; D29a). The Court specified, however, that pursuant to 18 U. S. C. Sec. 4208(a) (1) the petitioner should be eligible for parole after the expiration of six months' imprisonment (*Ibid*).

The Government's theory was that as a result of a plan which it claimed began in 1950 and lasted through all four of the indictment years petitioner diverted from his corporate enterprises, divers sums of money before it could reach the corporation (R3570, 3571-75, 6679-80, 6959-61, 6971-73; D57a, 58a, 631a-32a, 702a-03a, 710a-712a). Arrangements had been made by petitioner on behalf of some of his corporations to borrow from the Chemical Bank of New York by means of an F.H.A. insured loan sums running into a number of millions of dollars for the construction of apartments. The understanding with the bank included an agreement that ½% of the 4% would be paid as a refund, rebate or commission to the nominee of the Jonathan Woodner Company, which was petitioner's operating company (R3637-39, 3676-79; D69a-70a, 79a, 81a-82a). Jonathan Woodner Company designated a nominee to receive the refunds on the mortgages of the ½% and such repayments were turned into cash by the nominee who was an officer of a number of petitioner's corporations and served petitioner's enterprises in various capacities (*Ibid;* R3742-46; D100a-01a). Petitioner contended that the funds were

*References preceded by an "R" designate the pagination of the official record filed in the Court of Appeals, certified by the clerk, and filed in this Court; references preceded by a "D" designate the pagination in the printed appendix on appeal, nine copies of which have been filed in this court.

for corporate purposes and the question then remained whether there was a wilful intent to evade the federal income tax on such amounts (R6961-62, 6973; D702a-04, 712a).

1. Question Whether it is a Violation of Rules 24(a) and 43 of the Federal Rules of Criminal Procedure and the rights of Defendant to an Impartial Jury Under the Sixth Amendment for the Court to Examine in Unrecorded Private Conferences a Sworn Juror During the Trial and Prospective Jurors During the Process of Selecting Jurors for the Jury to try the Defendant.

The procedure for the selection of a jury in criminal trials used in this proceeding and almost universally followed in the Southern District of New York is for the Jury Clerk to send to the criminal part a panel of prospective jurors whose names are placed in a revolving drum. The jurors' names are then selected. The first twelve jurors' names are selected from the drum by the Deputy Clerk and the jurors take their places in the jury box. After these twelve were seated the trial court informed the jurors of the nature of the case. Before any challenges were exercised the court announced that it would confer privately with any prospective juror concerning his willingness to serve for four or five weeks which was expected to be the time required for the trial (R3414; D45a). No transcript of the communications between the court and prospective jurors was made (R3545-46, 3554, 7345; D54a-55a, 737a).

Although petitioner, his counsel and counsel for the government were available in the court room, all the private conferences between the prospective jurors and the trial court were out of their hearing (R3414, 3415A, 3420, 3426, 3428, 3431, 3433, 3435, 3436, 3438-39, 3440-41, 3451-52, 3453, 3458, 3467, 3470, 3486, 3488-90, 3505, 3507, 3516-17, 3518, 3522, 7344-46; D45a-54a, 737a-38a). Out of a panel of 65 prospective jurors the trial court conferred privately with at least 45 and excused on its own motion 21 jurors and 4 alternates but refused to excuse the remaining 20 jurors.

(*Ibid*). The Trial Judge in his opinion denying the motion for a new trial (R7544; D39a) stated that he had made a record of all the conferences with prospective jurors in handwritten notes and that they were all disclosed to counsel for the government and the petitioner. The record shows that most of the first twelve jurors called had a private off-the-record examination by the court and before counsel had any opportunity to object to this procedure nine of the first twelve prospective jurors who had conferred with the court returned to the box (R3414; D45a). Just after the court announced that the time had come for peremptory challenges but before any were exercised, counsel for the petitioner approached the sidebar and in the presence of counsel for the government objected to the manner in which the trial court had conferred privately with the prospective jurors (R3419-20; D45a). No transcript was made of this objection but counsel for petitioner immediately thereafter again approached the sidebar and placed his objection on the record*. (*Ibid*).

Despite the two objections before any peremptory challenges or challenges for cause, the trial court continued the practice of private conferences and excused several more jurors (R3426, 3428, 3433, 3435-36, 3438-39, 3440; D46a-47a).

The trial judge who had presided over petitioner's first trial and who conducted the *voir dire* was aware that the

*The statement in the Court of Appeals opinion upholding the Trial Court's method of conducting the *voir dire* that "no objection was made until a complete jury was selected and counsel were permitted to make peremptory challenges. This was obviously an attempt to get a look at the prospective jurors before deciding to object to the method of their selection. But it is then too late to raise the point," implying waiver, can only be explained on the basis that the Court below misread the record. This mistake was brought to the Court's attention in the petition for rehearing. For petitioner's counsel to object before he did would have required him to trample on the prospective jurors who were being examined privately by the Trial Judge.

testimony of officers from the Chemical Bank & Trust Company concerning transactions between that bank and petitioner and corporations in which petitioner held a controlling interest was of crucial importance to the government's case. At the second trial he excused on his own volition prospective jurors who in open court and private conferences said they were employed by or had dealings with the bank. Thus, he excused jurors who had the following relationships with the bank: one depositor; two employees; one business, family and social; and one who was an officer of American Bank Note Company (R3407-08, 3415, 3431-32, 3467-68, 3470-71). One prospective juror had a private conference with the Court and later on the *voir dire* said that his brother occupied a position as Assistant Vice President in the Chemical Bank & Trust Company. Petitioner's challenge for cause of this juror was denied and although there was a lengthy sidebar colloquy concerning this challenge, the Trial Court gave no information as to its private off the record examination of the juror and he served throughout the trial (R3440, 3441-50).

The Court after further complaint by petitioner's counsel of the private interviews with prospective jurors said that he had kept notes of *some* of his interviews and proceeded to inform counsel concerning them (R3446-49). A summary of private conferences with twelve of the jurors out of the twenty-five that he had already conferred with was then given. (*Ibid*). Petitioner's counsel then moved that the jury be discharged on the ground that the only way petitioner could obtain a fair jury was to select a new panel (R3449-50).

The motion was denied and the sidebar conferences continued with the Court giving counsel a summary of his private conferences with three of thirteen more prospective jurors that were so involved (R3451, 3452, 3453, 3458, 3467, 3470, 3483-84, 3486, 3488-90, 3492-94). Nine of the twelve jurors finally sworn, all of whom deliberated at the close of the case, had been examined by the Court out of the

hearing of petitioner and his counsel and if any notes were taken by the Trial Court of its private conferences with these sworn jurors they were not revealed to petitioner or his counsel (R3404, 3414, 3440, 6196-6212, 6348-59; D45a, 48a, 52a, 54a, 738a).

Before opening statements were made counsel for petitioner again objected to the manner in which the prospective jurors were questioned by the Court in the absence of counsel and petitioner and moved for a mistrial (R3545-46; D54a-55a). The Court denied the motion and in the process said that he had the jurors take their seat in the box "even where I had some slight doubt about it * * *" and also said "now I kept nothing from you or from the government which *I felt* should have been revealed" (R3550) (Emphasis added). No summary of private conversations was disclosed as to the twenty or more jurors whom the Court did not excuse. Of the forty-five jurors with whom he privately conferred, he advised counsel of the nature of the conferences with only twenty-two, all of whom were excused (Tr. 2-85, 2-99, 2-106) (R3446-49, 3492-94, 3550-56).*

Although the Court stated that the conferences concerned only reasons of "personal inconvenience" (R3449) and that the Court "had gone into purely personal matters" (R3548), statements from his notes as to the basis of the off the record statements were that in addition to the jurors referred to above who were excused because of relationships with the bank, two jurors were excused by reason of their off the record statements to the Court that they or immediate members of their families were under

*During the colloquy with counsel prior to opening statements the Trial Court stated on the record its own summary of private conferences with ten jurors (R3550-56). However, at least three of these summaries were repetitious and as such have been excluded from the total. Therefore the number of jurors who, after private examination by the Court, took seats in the jury box far exceeded petitioner's peremptory challenges, all of which were used (R3485, 3499-3500, 3506).

investigation by the Internal Revenue Service (R3446, 3556). When another prospective juror revealed in open court that she had an account with the bank, the Court after instructing the juror as to her duty to be impartial in the proceeding had a private conference with the juror (R3430, 3431).

The petitioner was aware of the expressed prejudice of the Court against him. (R3350; D738a) and this combined with the repeated private off the record conferences with the jurors in the selection process gave rise to the fear that he would be deprived of an impartial jury for his trial by something that might have occurred at an off the record conference.

2. *Question of Refusal of Government to Produce at the Trial Upon Demand United States Information Returns 1099 and 1096 of the Chemical Bank and Trust Company or to Disclose that Such Returns Were Not Filed, If That Were the Fact, and the Curtailment of Cross-Examination With Regard to Such Returns.*

As we have indicated above the Government contended that the [illegible] payments should have gone to the Jonathan Woodner Company but were diverted by the petitioner to wilfully attempt to evade the tax (R6971-73; D710a-11a). It was the petitioner's position that the funds belonged to the Jonathan Woodner Company and were held in cash for it by an officer of that company, the nominee (R5995-6001; D518a-20a). He further contended that the nominee was holding the funds for the benefit of the corporation because of threatened attachment proceedings by petitioner's wife who had sued to recover her stock in the corporation (R4011-14, 4914-16, 5992-95, 6973; D177a, 517a-19a, 712a). It was conceded that the payments were not reflected accurately in the books and records of Jonathan Woodner Company nor in the consolidated corporate income tax returns for 1952 and 1953. There was no dispute, however, that if the funds had been properly entered in the corporate books and reflected on the corporate tax returns no

tax would be due because of the very substantial losses the company had suffered (R5749, 5810, 6542, 6970-71; D472a, 489a, 623a, 710a).

Petitioner had advanced large sums to the corporations which appeared on his personal advance or loan account and it was the practice to either credit or debit that account when petitioner held funds for or received them from the corporation (R4432, 5654-57, 5780-81; D257a-58a, 446a-47a, 479a; Govt. Ex. 56-C). It was conceded that if that procedure had been followed, there would have been no taxable effect to the petitioner if the 1/2% payments had been properly charged to the petitioner's "advance account" and the payments would not have been taxable income to him (R4156-57; D225a-226a).

Petitioner's intent was, therefore, a crucial factor because the Jonathan Woodner Company owed him such substantial sums of money (running into hundreds of thousands of dollars), a source of tax free funds the use of which would not be a diversion of corporate or individual income and no tax would, therefore, be due (R4156-57, 5654-5726, 5749, 5810, 6542, 6970-71; D225a-26a, 446a-70a, 472a, 489a, 623a, 710a). The Government sought to show wilfullness by contending that the method of handling the 1/2% payments with the Chemical Bank was designed to conceal them from the auditors of the Jonathan Woodner Company so that they would not be reflected on that company's books and its corporate income tax returns (R5683-84; 6707-08, 6971-72; D711a).

Petitioner sought to show that many errors in bookkeeping and accounting entries occurred in the books of the Jonathan Woodner Company due to a tremendous increase in construction activities and that a substantial number of these were discovered and corrected by outside auditors of the corporation (R4417-21, 4496-99, 5285-88, 5668-70; D251a-53a, 267a-69a, 344a-45a, 450a-51a). A part of this procedure was the sending of confirmation reports by the auditors with petitioner's knowledge to third parties (R5947). This was done with the Chemical Bank and the

bank did not disclose the [illegible] payments in the reply it sent to the outside auditors, although the requests called for much detailed information (R3781-90, 3814-20, 5305-21, 5340-45; D119a, 349a-51a, 357a-58a). The inquiries from the auditors sent to the bank were with regard to the Jonathan Woodner Company and the mortgagor companies Chanute Apartments and Chanute Gardens each of which had an interest in the loan transaction (*Ibid.; e.g.*, D860a-63a).

The bank claimed through one of its officers, Hauser, that it considered the funds to belong to the nominee to whom they were paid and not to Jonathan Woodner Company and, therefore, its failure to respond to the confirmation requests of the auditors was justified on the ground that the funds did not belong to the Jonathan Woodner Company (R3696-99, 6429-34; D86a-87a, 599a-602a).

The prosecutor went even further and argued to the jury that the reason for petitioner directing the bank to make the payments payable to the nominee was that he knew that the bank would not in that event disclose the matter in the confirmation requests, and that if the payments had been directed to be made to the Jonathan Woodner Company, the bank might have disclosed them on the confirmation requests and the auditors might have found out about them (R6707-08).*

Inconsistent with Mr. Hauser's claims of the bank's position was the fact that the Chemical Bank admitted that it transferred these accumulated [illegible] payments from miscellaneous account in the name of Jasen to a "cash col-

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*Prosecutor's statement in full was:

"Now, why wasn't it on the confirmation which the bank sent? The reason is obvious and the reason shows one of the things that Woodner did to hide to this thing (sic). He made it payable to Jasen. If he made it payable to the company it might have been shown up; the company auditors might have found out about it. But, no, it was payable to Jasen and this was one of the significant things he did to hide the existence of these payments." (R6707-08).

lateral account" in 1953 when the Jonathan Woodner Company began to have financial difficulties with its building projects and this was done on the basis that the funds would be offset against the claims against Jonathan Woodner Company if the mortgage loan went into default (R3699-3701, 6433-34; D88a, 601a-02a). Obviously if they were truly funds of Jasen, they could not lawfully be offset against the obligation of the corporation.

The bank under Section 147(a) of Title 26 U. S. C. (1939 I. R. C.) was under a statutory duty to file information returns 1099 and 1096, if it considered the payments to belong to Jasen, and was only exempt from such a duty under certain circumstances if the payments were considered paid to a corporation such as the Jonathan Woodner Company or the mortgagor company (Sec. 39.147-3 of the Regulations). The petitioner therefore sought to elicit from Hauser on cross-examination whether such information returns reflecting the payments to Jasen had been filed by the bank (R6435-37, 6441-43; D602a-03a, 604a-06a). Petitioner sought to obtain the information from Hauser who said he did not know whether such information returns had been filed and did not have anything to do with the filing of tax returns and tax information returns (R6435-37; D602a-03a). Mr. Hauser conceded that he was aware that information returns were filed by the bank "on salaries and things" but was prevented from answering on objection of the prosecutor whether he knew if they were filed also on "commissions" (R6442). When the prosecutor was asked directly by the petitioner whether he had the information returns in his file, the Court directed that the prosecutor produce them if he had them in his file and the prosecutor answered "never heard of them" (R6442).

When the petitioner sought to obtain the information on cross-examination of Abraham Krieger, an agent of the Internal Revenue Service, who with other agents investigated the case against petitioner, the Trial Court refused to allow this over objections by the prosecutor (R6551-53;

D625a-26a). The prosecutor urged upon the Trial Court and his view was accepted that the duty to produce this information was on the petitioner not the Government who should, he said, have subpoenaed the banks records, even though it was information the Government had (R6441). Then petitioner tried to do that but was denied the right to do so by the Court (R6554-55).

The petitioner was seeking to obtain the information either that the information returns were in fact filed reporting the payments to the nominee, Jasen, or that they had not been filed which would have been strong evidence that the bank did not in fact consider the payments to belong to the nominee.

3. *Question Regarding Trial Court's Charge Ascribing Greater Weight to Circumstantial Than to Direct Evidence.*

The Trial Court advised the triers of the facts in his charge* that: "Sometimes circumstantial evidence is even

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*The Court charged: "Circumstantial evidence is proper and competent to prove the offense charged. Circumstantial evidence appeals to the common sense and common experience of mankind. These teach us that the known existence of some facts necessarily implies that other facts connected therewith exist. Sometimes circumstantial evidence is even more convincing than direct evidence, because direct evidence may depend upon the manner of observation and truth of one witness, while circumstantial evidence may be based upon the memory, observation and truth of many witnesses who concur and agree, or upon physical facts which cannot be mistaken, and cannot speak falsely." (R6988; D723a). The charge with respect to inferences that may be drawn from the proof was in precisely similar vein (R6985-87; D721a-22a).

The Court stated by way of illustration: "A common example is a person coming home at night and entering the family circle and the blinds are drawn, people at home don't know the weather outside and the person who enters sets out an umbrella, hangs up a raincoat and takes off his galoshes, it would be reasonable to infer that it is raining or stormy outside.

But if you were walking down the street on a sunny day and a person appeared to be all wet, you couldn't assume it was raining; there must be some other explanation for that fact" (R6987; D722a).

more convincing than direct evidence because direct evidence may depend upon the memory and observation and truth of one witness while circumstantial evidence may be based upon the memory, observation and truth of many witnesses who concur and agree or upon physical facts which cannot be mistaken and cannot speak falsely" (R6988; D723a). The instruction should be considered together with a further advice to the jury that "circumstantial evidence has loomed large in this case" (R6987; D722a), and "that a great deal of the evidence" is "not disputed" and that there are also very serious controversies with respect to the meaning of certain evidence which itself is not disputed (R6993; D725a). Petitioner's counsel noted particular exception to the charge with respect to the Court's "failure to indicate that where the evidence is consistent with guilt or innocence, they [the jury] shall reject that evidence from their consideration" (R7006-07; D731a) and the Court also refused the request that the jury be instructed that "where the facts or circumstances proved are susceptible to two inferences, one pointing to innocence and the other guilt, you must adopt the inference pointing to innocence" (R6916; D671a).

B. The Decision of the Court of Appeals.

The Court of Appeals in affirming the judgment of conviction of the petitioner dealt with the questions presented as follows:

1. The Court of Appeals accepted the statement of the Trial Judge without any record of what transpired during the conferences between the Court and the prospective jurors that these communications while the jury was being selected for the trial were merely a means by which the Trial Judge "heard hardship excuses." It also adopted the statement of the Trial Judge that he had made a record of all the conferences with the prospective jurors in handwritten notes and that these were all disclosed to counsel for the Government and the petitioner when the Court

of Appeals said: "The Judge made notes of excuses and advised counsel what they were."

The Court of Appeals approved the procedure followed saying: "We fail to see the remotest possibility of prejudicial error in this proceeding * * * ordinarily, the jury clerks hear such excuses, and defendants have the benefit of neither notes nor physical presence." Thus, it held that whatever the jury clerk might do in selecting a panel of jurors from citizens summoned by him before assignment to a particular case, the Trial Court might also do with a particular panel of jurors before him, for the selection of a particular petit jury to try a specific criminal case, under the aegis of that judge and with the limitations of examination of the jury on *voir dire* by the court. Then the Court concluded on this point "In addition, no objection was made until a complete jury was selected and counsel were permitted to make peremptory challenges. This was obviously an attempt to get a look at the prospective jurors before deciding to object to the method of their selection. But it was then too late to raise the point." The Court of Appeals cited *United States v. Meyer*, 113 F. 2d 387, 396 (7 Cir.), cert. denied, 311 U. S. 706 (1940) and said: "Objections are not insurance against an unfavorable result but must ordinarily be raised while there is still time to rectify the asserted error." (App. p. 5a).

The statements of the Court of Appeals as to when the objections of the petitioner were made is completely inaccurate. The first objection was made promptly before any peremptory challenges were exercised and at the first opportunity after the first group of jurors had returned to the jury box after their confidential discussions with the Court. Promptly thereafter it was made in the clearest of terms:

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* Mr. Bender: I want the record to note that I have just advised the Court that I must object to the manner in which some of these jurors were examined by the Court in the absence of counsel to determine whether or not they could sit and whether they had a proper excuse not to." (R.3420; 945a)

The objection was then repeated twice during the *voir dire* examination (R3420, 3449; D45a). Furthermore it was repeated again before any proceedings were taken in the case beyond impanelment of the jury (R3545-46; D54a-55a). It was also advanced on the motions at the close of the Government's case (R4609, 4615-18; D287a-88a). It was advanced on the motions after both sides had rested and urged at length as a principal ground in the post-trial motion for judgment of acquittal or a new trial and briefed and argued to the Court of Appeals before its decision and also on a petition for rehearing thereafter (R7205-06; D735a-741a). Thus, the facts do not support any claim that the petitioner was waiting until he could see who the prospective jurors would be before deciding to object to the method of their selection. Certainly there could be no misunderstanding in the Court's mind that petitioner was objecting to this type of proceeding in the selecting of jurors from the moment it started on through to the end of the trial and before the Court of Appeals.

The reliance of the Court of Appeals on the case of *United States* v. *Meyer*, *supra*, is misplaced. First, it should be observed that that case was a civil case where no peremptory challenges had been exercised by the defendant in the selection of the jury and no objection was made whatever to the manner in which the jury was drawn until after the verdict in a motion for a new trial (see page 396). Furthermore, the objection made by the defendant in that action was to the array and in particular to the manner in which by-standers were summoned as additional talesmen to complete the panel (page 395). But in that case even

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*In denying the motion to set aside the verdict the trial court indicated that it had been agreed that the Court would advise the prospective jurors of the contemplated length of the trial and the jurors be given an opportunity to offer excuses. It said "I heard no objection and proceeded on what I thought was our agreement." The record shows that there was no discussion or agreement concerning private or unrecorded discussions with the jurors and in fact there was never any such agreement (R7551-66).

when the challenge was made to the array, which is quite different from the selection of the petit jury to try an accused, the Court of Appeals of the Seventh Circuit held that the objection should be made "before, or at the latest, at the time of the examination of the jury" (page 396).

Returning to the facts here, certainly three different vigorous objections soon after the practice started and continued at the time of the examination of the jury fully satisfies all of the requirements of *United States* v. *Meyer*, *supra*. The important point is that the Trial Court had ample notice and opportunity to correct the situation as it was developing and every reasonable effort was made to persuade it to do so.

The Court of Appeals made no comment upon the fact although it was briefed and argued that there was no compliance with Section 753(b) of Title 28, U. S. C., known as the Court Reporters Act.*

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*"(b) One of the reporters * * * shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court;"

There was no record made of the Trial Court's private *voir dire* examination of 45 of the 65 jurors on the panel from which the jury which tried the case was selected. By sanctioning such private examination of prospective trial jurors by the Trial Court without any stenographic record the Court of Appeals brought its decision directly in conflict with decisions that the provisions of the Court Reporters Act for a verbatim record of *all proceedings in criminal cases* is mandatory; by the Tenth Circuit in *Parrott* v. *United States*, 314 F. 2d 40, 47 (10th Cir. 1963); by the Fifth Circuit in *Stephens* v. *United States*, 289 F. 2d 308 (5th Cir. 1961); by the Fourth Circuit in *United States* v. *Taylor*, 303 F. 2d 165, (4th Cir. 1962); and by the District of Columbia Circuit in *Poole* v. *United States*, 250 F. 2d 396 (D. C. Cir. 1957). See also *Goldfer* v. *United States*, 310 F. 2d 66 (5th Cir. 1963); *Strauss* v. *United States*, 311 F. 2d 926 (5th Cir. 1963) cert. denied, 5-13-63, —U. S. —, 31 U. S. L. Week 3374; *Addison* v. *United States*, 317 F. 2d 808, (5th Cir. 1963); and *Brown* v. *United States*, 314 F. 2d 293 (9th Cir. 1963); and *Greenhill* v. *United States*, 208 F. 2d 405, 371 U. S. 830, and No. 859, October Term, 1962, 31 U. S. Law Week 3339, cert. denied, April 15, 1963.

The Tenth, Fifth, Fourth and Ninth Circuits have all held that the requirement of a stenographic record of the proceedings is mandatory, as was the clear indication in the legislative history.*

The Court of Appeals did not comment upon the effect of this type of proceedings upon the constitutional rights of the petitioner to an impartial jury as guaranteed by the Sixth Amendment or the decisions of this Court holding that reversible error does not depend on a showing of prejudice in such a case** and the further fact that the procedure followed here did not permit the preservation of the opportunity to prove actual bias in order that petitioner's right to an impartial jury might be guaranteed in accordance with the amendment.†

There was no comment by the Court of Appeals to indicate that it recognized that the purpose of the statute as is clearly indicated by the legislative history was to provide a record by a court official which would no longer leave either the courts or the parties dependent upon the recollection of courts, parties or counsel for what actually occurred at trial proceedings.

Equally true is the fact that the Court of Appeals in approving the Trial Court's private unrecorded conferences with the jurors in effect sanctioned the exclusion of the petitioner from that portion of the impaneling of the jury. This was in direct violation of Rule 43 of the Fed-

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Poole v. *United States*, 250 F. 2d 396 (D. C. Cir. 1957), sets forth the legislative history in detail. *Parrott* and *Stephens* are parallel factually to the Second Circuit opinion although directly opposed in their legal conclusions. However, the later cases of the Fifth Circuit set forth, state the position of the Fifth Circuit to be that a showing of prejudice is required for reversal and that *Stephens* was never intended to hold that despite the fact that the statute is mandatory, the case would be reversed without a showing of prejudice.

**Ballard* v. *United States*, 329 U. S. 187, 195, 67 S. Ct. 261, 265 (1946).

†*Morford* v. *United States*, 339 U. S. 258, 259 (1950).

eral Rules of Criminal Procedure and contrary to previous decisions of this Court". We do not suggest that such a violation would result if counsel had been present at the conferences and a full record had been made.

2. The only ruling of the Court of Appeals on petitioner's claim of error on the refusal of the Government to produce at the trial and upon demand the United States information returns 1099 and 1096 of the Chemical Bank & Trust Company or to disclose to the petitioner and the Trial Court that such returns were not filed, if that were the fact, and the curtailment of cross-examination constituted the denial of due process under the Fifth Amendment was the following:

> "The inconsequentiality of defendant's other assignment of error testifies to the essential fairness of this long and strenuously-contested trial. The questions asked witnesses by the Trial Court were all proper and necessary clarifications; a federal trial judge is not powerless to prevent half-truths from being considered by the jury. *United States v. DeFillo*, 257 F. 2d 835 (2d Cir. 1958), cert. denied 359 U. S. 915 (1959); *United States v. Rosenberg*, 195 F. 2d 583 (2d Cir.), cert. denied 344 U. S. 838 (1952). Moreover, the Court's charge on the questions prevented any possible misunderstandings. * * * Defendant's other arguments do not merit discussion." (App. p. 6a)

We respectfully suggest that the treatment that the points received did not appear to properly take into account the importance of the information sought to the trial, or the duty of the United States Attorney under such

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"Trial includes the *voir dire* and impanelment of the jury in a criminal case. *Fillippon v. Albion Vein Slate Co.* 250 U. S. 76, 81; 39 S. Ct. 435 (1919); *Leach v. United States*, 146 U. S. 370 (1892); *Hopt v. Utah*, 110 U. S. 574 (1884); and *Diaz v. United States*, 223 U. S. 442, 445 (1912).

circumstances*. The opinion of the Court of Appeals showed that it gave no consideration to the fact that information returns were no less than written statements of the bank made contemporaneously with the transactions in issue** and no consideration to the principles laid down by this Court in *Jencks* v. *United States*, 353 U. S. 657 (1957); *Palermo* v. *United States*, 360 U. S. 343 (1959); *Campbell* v. *United States*, (I), 365 U. S. 98-99, 81 S. Ct. 428, (1961); *Campbell* v. *United States* (II) 373 U. S. 487, 83 S. Ct. 1361 n. 8 (1962); and *Killian* v. *United States*, 368 U. S. 231 (1961). Furthermore, the Court of Appeals appeared to give no serious consideration to the fact that this prosecution was conducted by the United States Attorney with the close assistance and collaboration of the agents of the Internal Revenue Service. They either had the information returns within the control and custody of that branch of the Government which should have been produced or they should have been able to inform the petitioner and the Court promptly that they had not received such information returns if they were to be permitted to press a serious claim of tax evasion.

3. Concerning the Trial Court's charge ascribing greater weight to circumstantial and to direct evidence and thus dissipating and undermining the general instructions on the standards of reasonable doubt, the Court of Appeals only comment was that circumstantial evidence is not "probat-

*See *Berger* v. *United States*, 295 U. S. 78, 88 (1934); *Bank Line* v. *United States*, 76 F. Supp. 801, 804; and the *United States* v. *N. Y., N. H. & Hartford R. R. Co.*, 355 U. S. 253, 256, n. 5; and *Campbell* v. *United States*, 365 U. S. 85, 96, (1961). See also *Pyle* v. *Kansas*, 317 U. S. 213, (1942); *Napue* v. *Illinois*, 360 U. S. 264 (1959); *People* v. *Hoffner*, 208 Misc. 117, 129 N. Y. S. 833, 837 (1952) as to the duty of the Prosecutor who has information in his possession helpful to the defense not to refuse to produce it and place the burden on the petitioner to discover it elsewhere.

**United States v. Beacon Brass Company, 344 U. S. 43, 46 (1952).

ively inferior to the direct evidence," citing *United States v. Brown*, 236 F. 2d 403 (2d Cir. 1956), and that while much of the evidence in the case is circumstantial as was often true, there was no obstacle to the conclusion that it was sufficient to convince the jury of guilt beyond a reasonable doubt." (App. p. 4a). It did not appear to recognize that the Trial Court had gone far beyond this Court's statement of the rule in *Holland v. United States*, 348 U. S. 121 (1954) where this Court indicated that circumstantial evidence and direct proof had equal standing and not that circumstantial evidence was or could be superior in any way to direct proof. The Court of Appeals did not show an appreciation of the fact that the instruction of the Trial Court largely destroyed the presumption of innocence in weighting the scales so heavily on behalf of circumstantial evidence.

The Court of Appeals failed to recognize that the charge of the Trial Court gave such weight to the circumstantial evidence that it could not be overcome by direct evidence regardless of quality if it was not of the same quantity. Since the petitioner was the only witness to his own intent the instruction in providing: "* * * Sometimes circumstantial evidence is even more convincing than direct evidence because direct evidence may depend upon the manner of observation and truth of one witness, while circumstantial evidence may be based upon the memory, observation and truth of many witnesses who concur and agree, or upon physical facts which cannot be mistaken and cannot speak falsely" (R698a; D723a), (See footnote, page 13, *supra*), was effectively to direct the jury to give his testimony less weight than that of the circumstantial evidence presented.

Reasons for Granting the Writ

1. It is destructive of the jury process to have private unrecorded communications between the Court and a sworn juror during the trial.

The conduct of the *voir dire* examination of the prospective jurors for the trial of the petitioner raises serious questions concerning the administration of justice in the federal courts where a jury is involved. The suggestion that such unrecorded, challenged, private conferences between the Trial Judge and prospective jurors during their *voir dire* examination, both as to their ability to serve and their qualification for such service, along with unrecorded, challenged, private conferences between the Trial Court and a juror during the trial strike at the very heart of the jury system. Such practices, if approved and continued, are certain to reflect adversely upon the manner in which jury trials are conducted in federal courts.

It is obvious that a jury trial without an opportunity within the requirements of the Federal Statutes and the Federal Rules of Criminal Procedure to determine that the jury is impartial violates the rights guaranteed by the Sixth Amendment. The actual selection of a jury for the trial of an accused is so different in both form and substance that it cannot be compared properly with the selection of an array by the Commissioner or Jury Clerk. Important as it is to one like the petitioner being tried for charges that would deprive him of his liberty, the procedures followed here, if continued, raise grave doubts in the minds of any observer as to how a fair hearing could be had without any assurance of an impartial jury.

It is not a question of having confidence in the fairness of District Judges as the Court of Appeals said.* Since it is human to err trial courts do commit errors and records of inadvertent or mistaken prejudicial remarks in the course of a trial appear too often, in the records that are made in conformity with the statute, for this Court to indulge in the presumption that they could not occur in private conferences with jurors.

But the effect goes even beyond such a possibility. It is important in the administration of justice that persons who are charged with crimes are not only heard under a system that provides reasonable means for their obtaining fair and impartial juries, but also that the proceedings be so conducted that they can be confident that reasonable efforts are being made to conform to the requirements of the statutes and rules controlling the procedures.

There can be no question but what the basic purpose of the Court Reporters Act was to eliminate from trials the necessity of relying upon notes, partial in nature as they often are, of judges or prosecuting attorneys or defense counsel. When a stenographic record is not taken, all parties are not only denied the benefit of that impartial record but they also have the problem of trying to establish prejudicial error which often can only be done if an adequate record is maintained.

It would seem that the prejudice is obvious where counsel is called upon to make his challenges to a jury without knowledge of the private communications they have made to the Court about their bias or prejudice. It would seem equally prejudicial to require the petitioner on appeal to establish bias or lack of impartiality of jurors when he has been deprived of an adequate record of their private conversations with the Court concerning their qualifications to serve.

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* "In some fifty-one districts the judges conduct all the *voir dire* examinations, and in twenty-two more districts the judge and counsel both ask questions." Report of Committee of United States District Judges to Chief Justice of United States and Judicial Conference, 26 F. R. D. 415, 466.

The rule announced below is to be followed promptly:

"The Court: * * * We might have to use the scheme, as some one has suggested, that was used in the Woodner case, Mr. Gottlieb, with which you are familiar.

Mr. Gottlieb: The Supreme Court is going to pass on that, I hope?

The Court: You are going to review that up there—Well, until that happens, I can probably live dangerously in any event." *U. S. v. Abrams, et al.*, pending in the Southern District of New York, 41 Cr. 332, June 4, 1963.

If the Second Circuit is to have a procedure for the selection of trial juries in accordance with that followed in this case and with similar unrecorded private communications between the Court and the prospective jurors and even with one of the jurors while he was serving on the case during the course of the trial*, it should be only with the approval of this Court. That Circuit has such a large proportion of the trials of cases with juries in the federal system that it is imperative if these practices are not to be approved, that that be determined as soon as possible so that other criminal actions will not be similarly affected.

When the holdings of the Court of Appeals are combined they are destructive of any real prospects of fair hearings. First, it will not presume that prejudice resulted in the absence of plain showing to that effect. Second, courts have enough confidence in the integrity and fairness of the District Judges so that they will assume that a District Judge will not make unfair remarks to jurors in such proceedings. Third, the requirement of the statute for a stenographic record of all proceedings in open court is not even held to be mandatory. This combination propounds an impossible rule. It is one that

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*After having been alerted by objection and motion for a mistrial as to private conferences, the Trial Court had ample notice of defense counsel's attitude toward private conferences with jurors when he held an unrecorded conference in Chambers with a sworn juror during trial out of the presence of counsel and the petitioner (R6196-0212, 0348-59; D738a). In persuading the juror to serve until the end of the trial, the Court stated that it "referred to the jurors in the Communist case who were out of circulation for several months." (R6199; D738a). It is not possible in the absence of a record showing what the Court actually said in referring to the jurors in the Communist case and with out the response of the juror conferred with to make an accurate evaluation of the impact of such a private conference. It is not unreasonable to assume that the juror received the impression that his duty in this case was comparable to that of trying and convicting "the Communists." In any event a defendant should not be exposed to the possibility of such prejudice.

practically precludes any plain showing by a defendant that a private conference with a prospective juror has been prejudicial when no record has been made of such a conference.

The numerous cases referred to above were in other Circuits. However, each Circuit except the Second has held that the requirements of the statute for a stenographic record of all proceedings in open court in a criminal trial is mandatory. This suggests that the time has come for this court to examine the question and clarify the responsibility to make such a record. Only in that event court proceedings will be conducted in accordance with the congressional purpose and intention. This question is also of major importance to the proper supervision by this Court, of the conduct of proceedings in federal courts. A controlling decision now, would improve the administration of justice currently and should not be delayed until many cases involving the failure to make a stenographic transcript have caused additional difficulties for both the litigants and the courts.

2. This Court's interest has always been challenged by a failure of those conducting a prosecution on behalf of the Government to make a full disclosure of evidence in the Government's possession, bearing upon the accuracy or consistency of the testimony of witnesses they present. So it has appreciated that the production of exculpatory evidence should be assisted wherever reasonably possible in the interests of securing a fair hearing to the defendant.

As this Court has repeatedly recognized there is a special burden on the Government in a prosecution not to withhold material evidence contributing to the defense of a citizen. Beyond that it has noted that there is an affirmative duty to come forward with such proof.

The question here which is important to the proper administration of justice, is whether the Internal Revenue Service in assisting with the investigation and prosecution of a criminal case for tax evasion, may withhold informa-

tion in its possession having a material bearing upon the guilt or innocence of the defendant. Such a failure to produce is inconsistent with the rudimentary demands of justice. In the face of the denial to the petitioner of the benefits of such evidence in this case, a statement by this Court is necessary, recognizing the rights of a defendant to such production as a part of a fair hearing and the proper conduct of criminal proceedings.

3. This case raises in a compelling posture the question of the weight to be ascribed to circumstantial as compared to direct evidence. If the Trial Court had followed the decision of this Court in *Holland* v. *United States*, *supra*, it would have been on safe ground. The Court of Appeals, referring to the settled rule in the Circuit and *United States* v. *Brown*, *supra*, misconceived petitioner's position in asserting that the rule was that circumstantial evidence was not "probatively inferior to direct evidence" (App. p. 4a). Petitioner's complaint was that the Court went far beyond either *Holland* or *Brown* and ascribed greater weight to circumstantial evidence. Such a rule largely eliminates the presumption of innocence.

However, there are additional reasons why this question should be considered by this Court at this time. The authorities are in a fluid and conflicting state where the courts have been interpreting and applying *Holland* and there has resulted a number of conflicting constructions that can only be clarified by an authoritative determination by this Court.

The Fifth Circuit has held that in a circumstantial evidence case the action would be one to be reviewed in the light of the rule that "circumstantial evidence must be not only consistent with the guilt of the accused but also inconsistent with every reasonable hypothesis of his innocence"*. The Court went on to say that upon its

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* *Strauss* v. *United States*, 311 F. 2d 926, 931 (5th Cir. 1963), cert. denied.

review of a motion for judgment of acquittal it was not whether in its opinion the evidence failed to exclude every other hypothesis other than guilt, but rather whether there was evidence from which the jury might reasonably so conclude. On the other hand the Sixth Circuit held with regard to 'circumstantial' proof that it need not be as claimed such as to exclude every reasonable hypothesis other than that of guilt, citing *Holland*.*

But the Eighth Circuit held concerning the same matter "[t]he principle is firmly established that unless there is substantial evidence excluding every other hypothesis but guilt, a submissible case is not made, and, where all the evidence is as consistent with innocence as guilt, the reviewing court must reverse a judgment of conviction."** However, the Court of Appeals of the District of Columbia, stated in an opinion in 1957 that the rule for the jury was that unless there was substantial evidence of facts "which exclude every reasonable hypothesis but that of guilt, the verdict must be not guilty, and that where all the substantial evidence is consistent with any reasonable hypothesis of innocence the verdict must be not guilty".†

When finally, quite recently the Court of Appeals for the District of Columbia referring to the fact that *Carter*, *supra*, was decided after *Holland*, *supra*, and stating the rule that we have referred to above said that "the ultimate test for a jury in a criminal case, however, is whether the defendant has been proved guilty beyond a reasonable doubt" and that "this applies whether the evidence relied on for the conviction is direct or circumstantial, or both." The court then proceeds further, however, and says: "[i]n explaining reasonable doubt in a circumstantial case *it would not be improper* to give 'an every reasonable hypothesis' instruction in the language of *Carter*", which is

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*"*United States* v. *Carter*, 311 F. 2d 934, 940 (6th Cir. 1963)

**"*Sykes* v. *United States*, 312 F. 2d 232, 235 (8th Cir. 1963)

†*Carter* v. *United States*, 252 F. 2d 608, 612, 613 (D. C. Cir. 1957).

not required "where the jury is properly instructed otherwise on the standard of reasonable doubt", and citing *Holland*.*

From the confusion indicated, amplification of the doctrine enunciated by the court in *Holland, supra*, is essential to the administration of justice. Especially is this so where as has occurred in this case greater weight was ascribed to the circumstantial as against the direct proof and where in addition the Trial Court elaborated upon the special value of circumstantial evidence in his charge and resorted to graphic illustrations which were designed to give added emphasis to the charge.

CONCLUSION

The questions presented are of major importance to the administration of justice in the federal courts. Their authoritative resolution by this Court would promptly and materially improve the conduct of jury trials in the federal court system. It would be of immediate assistance to the courts who are having to pass upon similar issues currently without the benefit of that guidance. It would help to avoid erosion of the jury system and a lack of confidence in its integrity. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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New York 36, New York,
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Samuel Gottlieb,
Louis Bender,
Lloyd A. Hale,
Of Counsel.

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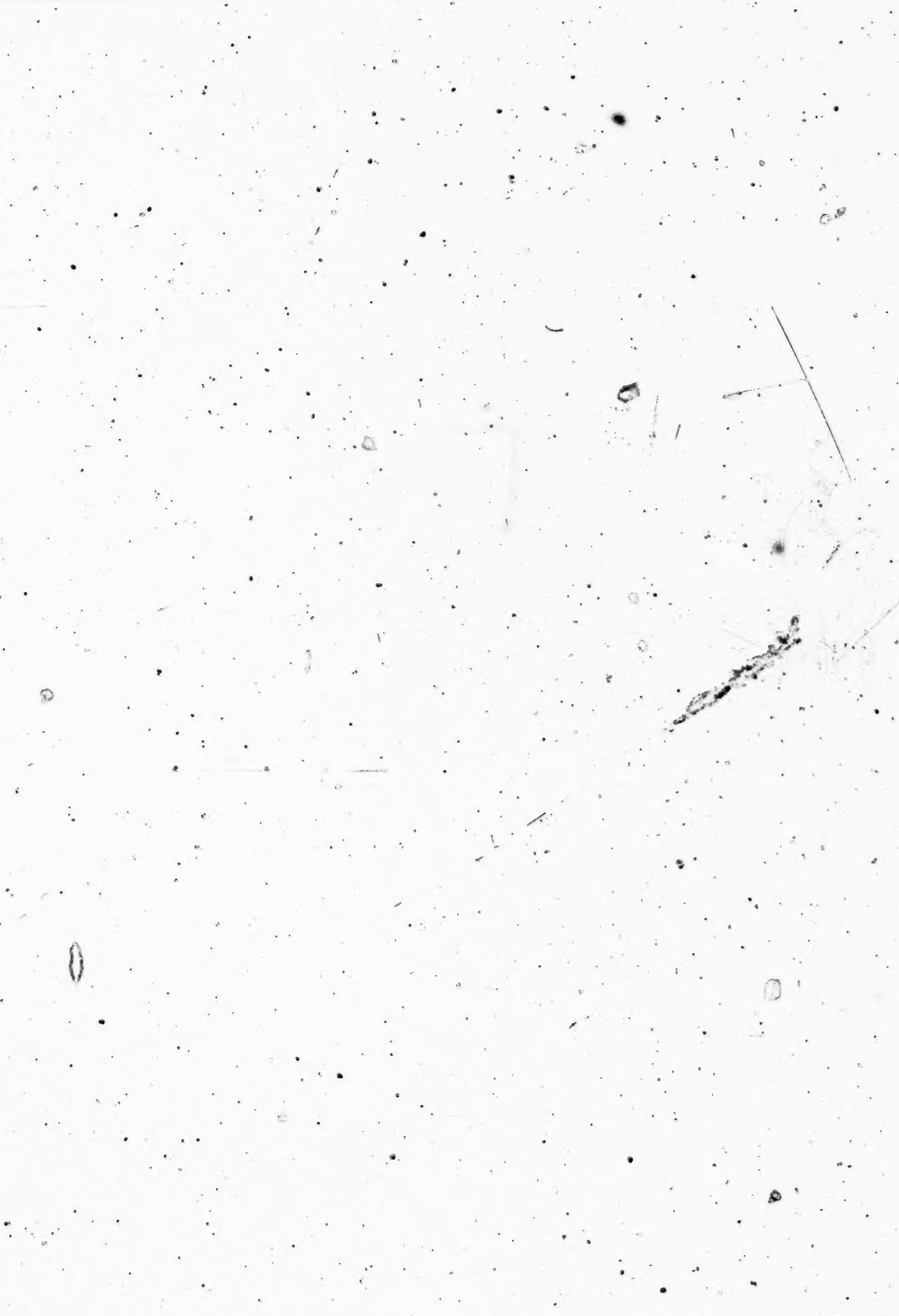
*Hunt v. United States, 316 F. 2d 652 654, D. C. Cir. 1963) emphasis by the court.



Appendix A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 256, 257—October Term, 1962.

(Argued March 12, 1963 Decided May 28, 1963)

Docket Nos. 27833, 27834

UNITED STATES OF AMERICA,

Appellee,

v.

IAN WOODNER,

Appellant.

Before:

MOORE, FRIENDLY and SMITH, *Circuit Judges*.

Appellant was convicted on trial to the jury in the Southern District of New York, Edmund L. Palmieri, Judge, on two counts of violation of § 145(b) of the Internal Revenue Code of 1939, wilful attempt to evade his personal income taxes for the years 1952 and 1953, and he appeals.

Affirmed.

SAMUEL GOTTLIEB, New York, N. Y. (Harry Giesow and Gainsburg, Gottlieb, Levitan & Cole, New York, on the brief) *for appellant*.

SHELDON H. ELSEN, Asst. U. S. Attorney, So. Dist. of New York (Robert M. Morgenthau, United States Attorney, and Charles A. Stillman and Arnold N. Enker, Asst. U. S. Attorneys, on the brief) *for appellee*.

SMITH, *Circuit Judge*:

Appellant was charged in the United States District Court for the Southern District of New York in a one-count indictment and a three-count indictment consolidated for trial, with wilful attempt to evade personal income taxes for the years 1950, 1951, 1952 and 1953, in violation of § 145(b), Internal Revenue Code of 1939. On a first trial, Judge Palmieri presiding, the jury failed to agree; on a second trial, Judge Palmieri again presiding, the jury found Woodner guilty on the counts involving taxes for the years 1952 and 1953 and failed to agree on the other counts. Appellant questions the sufficiency of the evidence to support a finding of intent to evade, the claimed failure of circumstantial evidence to exclude all reasonable doubt, the conduct of the trial, including the court's examination of witnesses and handling of jurors' requests for excuses, and inconsistency of verdict and disagreement on other counts. We find no error and affirm the judgment.

Essentially, the government's proof was directed to the handling of financial transactions of corporations controlled by Woodner which in two major respects was claimed to have resulted in income to Woodner personally not reported on his returns for the years in question. These were payments of corporate funds for the hire of detectives investigating the activities of Woodner's ex-wife, with whom Woodner was having difficulties, involving according to Woodner a threat to control of the corporations, and for Woodner's personal expenses, and funds paid to one Jasen, Woodner's nominee, by a lending institution, consisting of a percentage of interest on construction loans paid by two Woodner corporations engaged in FHA guaranteed apartment projects at or near Chanute Air Force Base at Rantoul, Illinois. On the counts involving the detective fees the jury failed to agree. The counts on which the jury found Woodner guilty, and which are before us on this appeal, involve the Jasen payments.

The borrowing corporations, Chanute Gardens Corporation and Chanute Apartments Corporation, were wholly owned subsidiaries of Shipley Corporation, as were numerous other similar corporations. Woodner controlled Shipley Corporation and through it its subsidiaries, including Jonathan Woodner Company. In 1950 Woodner negotiated with Chemical Bank and Trust Company construction loans on the two Rantoul projects, with an agreement that the Chanute corporations should be charged 4% interest, of which the bank would retain 3½% and remit ½% to Jonathan Woodner Company or its nominee. One Jasen, Woodner's employee and friend, was designated by Woodner as recipient of the funds and received from the bank checks for the agreed ½%. Jasen cashed these checks and placed the proceeds at first in a briefcase kept in Woodner's living room, also used as an office by Woodner, later in a safe-deposit box to which only Jasen and Woodner had access. There the cash was mingled with other personal funds of Woodner and used to pay bills of Woodner and in some instances to make advances on Woodner's account to the Jonathan Woodner Company. Because of restrictions on salary payments while the projects were in some difficulty, Woodner's reported salary dropped from $30,000 each in 1950 and 1951 to $3,500 in 1952 and $5,000 in 1953.

Woodner's principal argument seems to be that because of the size of his operations and the large amounts of money necessarily handled in carrying them out, he could not conceivably have intended to cheat the government on relatively minor amounts such as were involved in the taxes on the so-called kick-backs of ½% in the two years for which he was convicted. That argument, however, was for the jury, which was surely entitled to reject it in the face of the quite numerous and quite usual indicia of fraud in the handling of the ½% payments. The use of a nominee, the conversion to cash, lack of usual records, commingling of funds, and personal use, not only support the inference that the funds were so within Woodner's control and dis-

position as to constitute income to him personally, but also the inference that the intent of the scheme was to conceal the receipt of the personal income in order to evade the tax due thereon.

He also claims that the cash was a reserve for emergency corporate expenses that might arise, either through scarcity of building materials or due to harassing litigation brought by the ex-Mrs. Woodner. But the small size of the amounts in question makes the reserve far better suited to meeting personal expenses than the contingencies that might befall a sizeable corporate complex. We have carefully considered the voluminous record before us, and conclude that, taking the view of the evidence most favorable to the government, there is ample evidence to support the verdict. *United States* v. *Robertson*, 298 F. 2d 739 (2 Cir. 1962); *United States* v. *Tutino*, 269 F. 2d 488 (2 Cir. 1959); *United States* v. *Brown*, 236 F. 2d 403 (2 Cir. 1956).

Defendant also complains of the use of many items of circumstantial evidence against him. But the settled rule in this Circuit is that circumstantial evidence is not "probatively inferior to direct evidence." *United States* v. *Brown*, *supra*, at 405. Thus, it may be weighed by the jury in the same way as direct evidence and need not exclude all other reasonable hypotheses than that of guilt to be given whatever probative force it deserves. *United States* v. *Tutino*, *supra*; *United States* v. *Moia*, 251 F. 2d 255 (2 Cir. 1958). That much of the evidence in this case was circumstantial, as is often true, is no obstacle to the conclusion that it was sufficient to convince a jury of guilt beyond a reasonable doubt. We therefore reject defendant's arguments directed toward sufficiency of the evidence and toward the charge on circumstantial evidence.

The asserted errors in the conduct of the trial largely involve communications between the trial judge and actual or prospective jurors. Defendant asserts error was committed in the method by which hardship excuses were granted. The prospective jurors were called to the bench

and heard on their situations by the trial judge, who advised them that the trial would be of some four or five weeks duration. These conferences were in the sight of defendant and his counsel and of government counsel but out of their hearing. The judge made notes of the excuses and advised counsel what they were. We fail to see the remotest possibility of prejudicial error in this procedure, and defendant has not advised how prejudice might have arisen. Ordinarily, the jury clerks hear such excuses; and defendants have the benefit of neither notes nor physical presence. We have upheld the propriety of that mode of proceeding. *United States* v. *Flaxa*, 216 F. 2d 354, 386-88 (2 Cir. 1954), cert. denied 348 U. S. 909 (1955). Defendant's complaint about a procedure better calculated to safeguard his right to an impartial jury can hardly be accepted. In addition, no objection was made until a complete jury was selected and counsel were permitted to make peremptory challenges. This was obviously an attempt to get a look at the prospective jurors before deciding to object to the method of their selection. But it is then too late to raise the point. *United States* v. *Meyer*, 113 F. 2d 387, 396 (7 Cir.), cert. denied 311 U. S. 706 (1940). Objections are not insurance against an unfavorable result but must ordinarily be raised while there is still time to rectify the asserted error.

Defendant next complains of private conferences between two jurors and the trial judge during the trial. At one point during the impaneling of the jury, in the consideration of requests by jurors to be excused, the judge spoke with Juror Mutchler, who thereafter on voir dire examination in open court acknowledged that his brother was an officer of the Chemical Bank New York Trust Company. Mutchler stated that he did not know the witnesses who were to be called that were bank employees, that his judgment would be unaffected by his brother's employment and that he could weigh all testimony without prejudice. He was allowed to remain on the jury. At a later time

near the end of the trial, the trial judge spoke with Juror Koller, to convince him to remain on the jury after he had asked to be excused for personal hardship. No stenographer was present, as the judge believed that this would have hampered free conversation. It was the recollection of Judge Palmieri and the Government attorney that all counsel had agreed to this latter meeting without objection from the defense. But even if this was not the case, we would hesitate to presume that prejudice resulted in the absence of some plain showing to that effect. See *United States* v. *Agueci*, 310 F. 2d 817, 834-35 (2 Cir. 1962); *United States* v. *Compagna*, 146 F. 2d 524 (2 Cir. 1944), cert. denied 324 U. S. 867 (1945). We have enough confidence in the integrity and fairness of the District Judges to assume that they will not make unfair remarks to jurors while undertaking administrative duties of this nature.

The inconsequentiality of defendant's other assignments of error testifies to the essential fairness of this long and strenuously-contested trial. The questions asked witnesses by the trial court were all proper and necessary clarifications; a federal trial judge is not powerless to prevent half-truths from being considered by the jury. *United States* v. *DeFillo*, 257 F. 2d 835 (2 Cir. 1958), cert. denied 359 U. S. 915 (1959); *United States* v. *Rosenberg*, 195 F. 2d 583 (2 Cir.), cert. denied 344 U. S. 838 (1952). Moreover, the Court's charge on the questions prevented any possible misunderstandings. Reference by the Government on summation to defendant's wealth at the time of the alleged offenses was a justifiable reply to the defense argument that there was no reason for a man possessing defendant's resources to conceal the amounts of income in question. See *United States* v. *Stromberg*, 268 F. 2d 256, 270-71 (2 Cir.), cert. denied 361 U. S. 863 (1959); *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2 Cir.), cert. denied 329 U. S. 742 (1946). Defendant's other arguments do not merit discussion.

The judgment of conviction on two counts of the indictment is affirmed.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI—Jury Trial For Crimes, And Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Court Reporters Act

28 U. S. C. 753. REPORTERS

(a) Each district court of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall appoint one or more court reporters.

The number of reporters shall be determined by the Judicial Conference of the United States.

The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by any of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; * * * June 25, 1948, c. 646, 62 Stat. 922.

Statute On Exclusion Or Excusal From Service

28 U. S. C. §1863. Exclusion Or Excuse From Service

(a) A district judge for good cause may excuse or exclude from jury service any person called as a juror.

(b) Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice.

(c) No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color. June 25, 1948, c. 646, 62 Stat. 952.

Statute on Selection of Jury Array

28 U. S. C. §1864. Manner of Drawing; Jury Commissioners and Their Compensation

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive $5 per day for each day necessarily employed in the performance of his duties.

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

This section shall not apply to the District of Columbia. June 25, 1948, c. 646, 62 Stat. 952.

Rule 24 of Federal Rules of Criminal Procedure

Rule 24. Trial Jurors

(a) *Examination.* The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) *Peremptory Challenges.* If the offense charged is punishable by death, each side is entitled to 20 peremptory

challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) *Alternate Jurors.*. The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

* * *

Rule 43 of Federal Rules of Criminal Procedure

RULE 43. PRESENCE OF THE DEFENDANT

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the

jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant; may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

Appendix B

Judgment

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of May one thousand nine hundred and sixty-three.

PRESENT:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IAN WOODNER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION, WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of June, one thousand nine hundred and sixty-three.

PRESENT:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IAN WOODNER,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IAN WOODNER,

Defendant-Appellant.

A petition for a rehearing and for other and further relief, having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and hereby is denied.

Further ordered that the mandate be and it hereby is stayed pursuant to and subject to the provisions of Rule 28(c) of the rules of this court.

Further ordered that bail be and it hereby is continued pending an application for a writ of certiorari to the Supreme Court of the United States.

A. Daniel Fusaro
Clerk

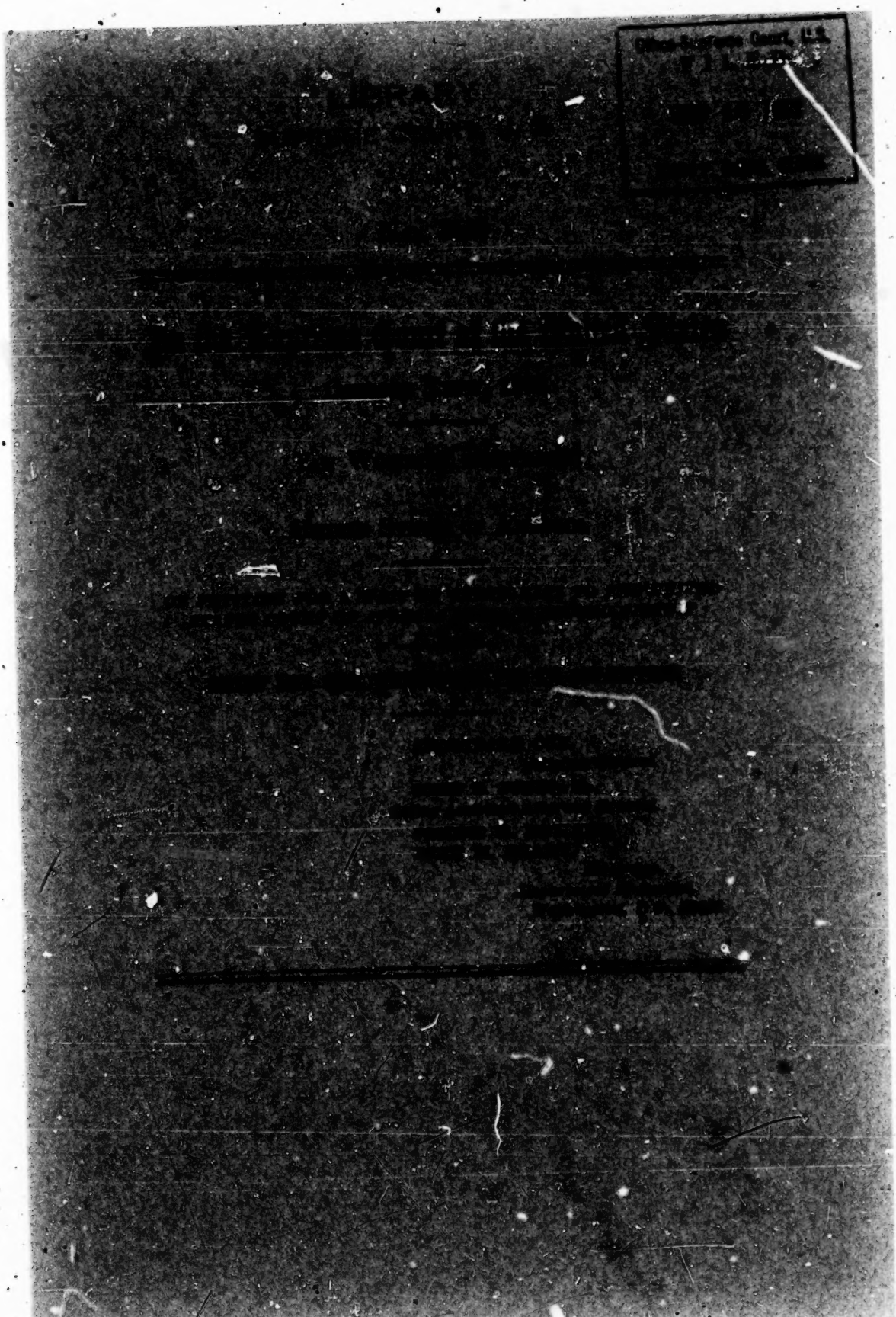
Petition for rehearing denied.

Petition for stay of mandate subject to provisions of Rule 28(c) of the Rules of the United States Court of Appeals for the Second Circuit granted.

Petition for continuance of bail granted (Rule 46 (a) (2) Rules of Criminal Procedure.

6 18 63

L. P. M.
H. J. F.
J. J. S.
U. S. C. J. J.



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 383

IAN WOODNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

Two opinions of the district court on pre-trial motions are reported at 189 F. Supp. 355 and 28 F.R.D. 22. The opinion of the district court denying a motion for new trial (R. 30a–43a)[1] is not yet reported. The opinion of the court of appeals (Pet. 1a–6a) is reported at 317 F. 2d 649.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1963 (Pet. 12a). A petition for rehearing was denied on June 18, 1963 (Pet. 13a–14a). On

[1] "R." references are to petitioner's appendix in the court of appeals. "Supp. R." references are to the government's appendix in the court of appeals.

July 10, 1963, an order was signed by Mr. Justice Harlan extending the time to file a petition for a writ of certiorari to August 17, 1963. The petition was filed in this Court on August 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge committed reversible error when, without prior objection from petitioner's counsel, he conferred privately and off the record in open court with prospective jurors who sought to be excused on grounds of hardship from serving in petitioner's extended trial.

2. Whether the government unfairly withheld certain documents from petitioner.

3. Whether the district court's instruction on circumstantial evidence was erroneous.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not

more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

28 U.S.C.:

SEC. 753. REPORTERS.

* * * * * *

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court: * * *

Federal Rules of Criminal Procedure:

Rule 43

PRESENCE OF THE DEFENDANT

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not

required at a reduction of sentence under Rule 35.

STATEMENT

1. Petitioner was charged in four counts with willful attempts to evade his individual income taxes for the years 1950, 1951, 1952 and 1953, in violation of Section 145(b) of the Internal Revenue Code of 1939 (R. 3a–5a). After a jury trial of more than four weeks, the jury disagreed as to the counts for 1950 and 1951, but found petitioner guilty on the counts pertaining to 1952 and 1953. Petitioner was sentenced to imprisonment for concurrent terms of 2½ years and was fined a total of $20,000, with a direction that he become eligible for parole after serving six months of the sentence (R. 28a–29a). The district court denied petitioner's motion for acquittal or for a new trial (R. 30a–43a), and the court of appeals affirmed the judgment (Pet. 6a).

2. Petitioner was first tried on these charges in 1961. After a six-week trial, the jury failed to reach a verdict on any of the four counts, and a mistrial was declared (R. 30a, 36a). At a pretrial conference which preceded petitioner's second trial, it was agreed that the trial judge would inform prospective jurors that the trial would be a lengthy one (R. 38a–39a; Supp. R. 18a).

Petitioner's second trial began on April 9, 1962. Twelve persons of a panel of about seventy talesmen first took seats in the jury box and were questioned by the court as to possible prejudices and relationships with the parties, counsel, or with the Chemical Bank and Trust Company, which was involved in the case (Supp. R. 2a–11a). One juror was

excused (Supp. R. 6a). The court then informed the prospective jurors that the trial would take four to five weeks, and stated (Supp. R. 12a):

> Now, I would like those of you who have any serious excuses which might prevent you from attending for that length of time to advise me now and I will confer with you privately about it.

Six or more prospective jurors raised their hands. With no objection from petitioner's counsel, the court proceeded to confer privately at the bench with each such juror, and three of them were excused (Supp. R. 12a). Thereafter, the *voir dire* continued with respect to those who took the seats of the excused talesmen. One was an employee of the Chemical Bank, and she was excused (Supp. R. 12a–13a). The prospective juror who took her seat suggested that the duration of the trial might present a problem to him, and he was invited to approach the bench and to confer privately with the court (Supp. R. 13a). Again there was no objection made by petitioner's counsel.

When the court announced that counsel should begin to exercise their peremptory challenges, petitioner's attorney first noted his objection. He said at a bench conference (Supp. R. 17a):

> I want the record to note that I have just advised the Court that I must object to the manner in which some of these jurors were examined by the Court in the absence of counsel to determine whether or not they could sit and whether they had a proper excuse not to.

Petitioner's counsel followed this statement with an objection to the court's disclosure to the prospective jurors that the trial was expected to last four or five weeks, asserting that businessmen would be reluctant to serve for so long a time (Supp. R. 17a–18a). The ensuing colloquy at the bench concerned the question whether counsel had agreed that the expected duration of the trial should be disclosed to the talesmen; nothing further was said with reference to the private conferences with prospective jurors (Supp. R. 18a–19a). No objection whatever was made at this time to the failure of the court stenographer to transcribe what was being said at the private conversations.

At the conclusion of the bench conference during which these objections were made, two other prospective jurors expressed a desire to speak to the court about the length of the trial. One of these was excused (Supp. R. 22a). The talesman who replaced the excused juror also conferred privately with the court and was excused (Supp. R. 23a).

The same procedure was followed with respect to the prospective jurors who replaced those who were challenged peremptorily or for cause by counsel for both sides. In each instance the private conference was at the bench, in open court, but out of the hearing of counsel and off the record (Supp. R. 19a–36a). No further objection was made by petitioner's counsel. When the process was concluded, the court informed both counsel of the reasons given by the prospective jurors who had been excused (Supp. R. 37a–38a). Petitioner's counsel, objecting again to the fact that the possible duration of the trial had been mentioned to the prospective jurors, moved "that this

entire group be discharged and we pick a jury from a new group of seventy-five people without any mention of length of time" (Supp. R. 39a). The motion was denied, and, after some further proceedings, the jurors were sworn (Supp. R. 47a).

The next morning, petitioner's counsel moved for a mistrial, stating that the "manner in which the prospective jurors were questioned * * * in camera in the absence of counsel and the defendant was improper," and amounted to a violation of Rule 43 of the Federal Rules of Criminal Procedure (Supp. R. 49a–50a). The court explained that he heard the excuses in private because "I know from experience that discussions of personal reasons of excuse before a large group of people who are not anxious to be tied down inspires the submission of similar [successful] excuses by those who hear" (Supp. R. 52a). Petitioner's counsel then urged for the first time that the conversations between the court and the prospective jurors "should be a matter of record" (Supp. R. 56a). The motion for a mistrial was denied (Supp. R. 58a–59a).

3. The sufficiency of the evidence to support the verdict is not challenged by the petitioner. It may be summarized briefly as follows:

From 1950 through 1953, petitioner was president and controlling stockholder of a group of corporations engaged in the real estate and construction business. These included Shipley Corporation, a holding company, which owned Jonathan Woodner Company and about forty-five to fifty other corporations (Supp. R. 184a–186a; Govt. Exs. 5, 8, 38). The counts relating to the years 1952 and 1953 the only ones upon

which petitioner was convicted—were based upon certain interest rebates and a refunded FHA filing fee which were allegedly diverted from the Jonathan Woodner Company to petitioner's personal use.

This income grew out of construction loans from the Chemical Bank and Trust Company to two subsidiaries of Shipley Corporation—Chanute Gardens Corporation and Chanute Apartments Corporation (Supp. R. 74a–76a). Petitioner, on behalf of Jonathan Woodner Company, personally negotiated the loans with the bank in 1950. The bank agreed to lend about $6,500,000 at 4 percent interest to the Chanute corporations, and to rebate ½ percent to Jonathan Woodner Company or its nominee (Supp. R. 61a–66a, 74a–76a). The bank would have been willing to make the loans at 3½ percent interest but it agreed to the rebate arrangement at petitioner's request (Supp. R. 76a). Thereafter, petitioner instructed the bank to pay the rebates to one Edward Jasen (Supp. R. 77a, 277a), who was petitioner's personal friend and had been employed in petitioner's business enterprises since 1947 (Supp. R. 130a). Petitioner also instructed the same bank to pay to Jasen, instead of to the Jonathan Woodner Company, a refund of $9,720, representing filing fees in connection with a rejected FHA mortgage loan application (Supp. R. 68a–73a, 429a–425a). The rebates totalled $7,740.45 in 1951, $30,407 in 1952, and $15,163.45 in 1953 (Supp. R. 442a–443a).

Jasen endorsed the FHA refund check, cashed it into denominations of not more than fifty dollars, and placed the cash in a briefcase which was kept in the Shipley Corporation's offices located in petitioner's home (Supp. R. 131a, 136a, 263a, 285a). In Febru-

ary 1952, Jasen leased a safe deposit box at the National City Bank and transferred the cash to the box. Only Jasen and petitioner had access to this box (Supp. R. 132a–133a). Thereafter, Jasen regularly cashed the rebate checks into denominations of not more than fifty dollars and put the cash in the box (Supp. R. 135a–136a, 426a–431a).

Jasen testified that he "considered all of these funds [in the box] to be Mr. Woodner's funds" (Supp. R. 137a), and that he commingled the rebate money with other cash given to him by petitioner for his personal use. Petitioner testified that he never discussed the ownership of the cash with Jasen, but that he regarded all the funds as belonging to the Jonathan Woodner Company (Supp. R. 286a). At various times, generally on petitioner's instructions, Jasen withdrew cash from the box and deposited it in petitioner's personal bank account, gave it to petitioner, or paid it to employees of the Jonathan Woodner Company (Supp. R. 138a–141a). On occasions when it received these funds, the company was instructed by Jasen to enter the amount on its books as a loan from petitioner (Supp. R. 146a, 168a–173a; 412a–413a, 454a–457a). Petitioner testified in his own behalf, and offered explanations as to the procedures followed with respect to these payments (Supp. R. 270a–324a). It was undisputed that neither the rebate payments nor the refund of the FHA filing fee were reported on petitioner's tax returns.

ARGUMENT

None of petitioner's contentions calls for review by this Court since all were correctly rejected by the

district court and by the court of appeals. There is no conflict of decisions concerning any of the questions presented, nor was any issue decided inconsistently with any opinion or decision of this Court.

1. Petitioner's principal contention is that the district court engaged in impermissible private communications with prospective jurors who asserted that a lengthy trial would impose a hardship upon them. This argument is based primarily on Rule 43 of the Federal Rules of Criminal Procedure, which provides: "The defendant shall be present * * * at every stage of the trial including the impaneling of the jury * * *."

The stage at which prospective jurors' hardship excuses are considered, however, is not a "stage of the trial" or any part of the "impaneling of the jury." As the court of appeals observed (Pet. 5a), it is a function which may be performed by jury clerks, who need not even report their findings to the parties. *United States* v. *Flynn*, 216 F. 2d 354, 386–388 (C.A. 2), certiorari denied, 348 U.S. 909. Consideration of hardship excuses is one of the "administrative procedures in advance of trial" which were established "to eliminate from the panel those who * * * would be rejected by the court after its time had been taken in examination to ascertain the disqualifications." *Fay* v. *New York*, 332 U.S. 261, 271.

Section 753(b) of the Judicial Code, also relied upon by petitioner, is inapplicable for the same reason. It requires court reporters to "record verbatim * * * all proceedings in criminal cases had in open court." But when the district court is engaged merely in the sort of administrative tasks which are ordi-

narily left to jury clerks, there is no more reason to require that colloquy be transcribed than there is to require transcription of the jury clerks' interrogations of prospective jurors. Hence, the conversations between the talesmen and the court were not the "proceedings" contemplated by 28 U.S.C. 753(b).

In any event, petitioner's objections were correctly rejected by the district court because they came too late. No objection was made when the first group of prospective jurors approached the bench. Contrary to petitioner's claim that counsel would have had "to trample on the prospective jurors who were being examined" (Pet. 6, note *), all that petitioner's attorney had to do under the circumstances was to rise and state his objection. Moreover, counsel remained silent even after the first group of jurors had been privately interviewed, and subsequently made no effort to prevent the court from having another private conversation with a *single* prospective juror who had replaced one of those excused by the court. (See p. 5, *supra*.) And the objection, when finally made, adverted only to the "absence of counsel," failed to cite Rule 43, made no reference to the reporter's failure to transcribe the conversations, and was quickly dropped. It was not reasserted at any other point during the day's proceedings. In these circumstances, the court was justified in continuing with the course it had adopted at the outset. The more complete statement of the grounds for petitioner's objection which was offered the following morning, after the jury had been sworn, obviously came too late to permit the court to rectify whatever error may have been committed. And the afterthought that the conversations

should have been made "a matter of record" could hardly be taken as a timely preservation of petitioner's present argument based upon 28 U.S.C. 753(b).

2. Petitioner's contention that the government withheld certain documents relevant to his defense is patently without merit. The documents in question were information returns which the Chemical Bank may have been required to file under Section 147(a) of the Internal Revenue Code of 1939. They were neither mentioned nor requested before the last day of the second trial, when the bank's mortgage loan officer was recalled by petitioner and asked whether the bank had filed such returns with reference to the rebate payments. He replied that these matters were handled by a different department within the bank, and that he had no knowledge whether such returns were filed (R. 602a). Thereafter, petitioner's counsel requested the government to produce the returns. The court ordered government counsel, "If you have them in your file * * * I direct you to produce them." Government counsel replied that he had "[n]ever heard of them" (Supp. R. 362a).

Assuming *arguendo* that the documents were relevant, petitioner's demand obviously came much too late. No effort was made before or during trial to subpoena these documents—as could have been done under Federal Rule of Criminal Procedure 17(c)—and petitioner was not entitled to force proceedings to a halt on the last day of trial merely to gain possession of papers whose existence was doubtful and

whose relevance was obscure.[2] At best, the returns were only remotely relevant. Only if they were filed, and if the Jonathan Woodner Company was named as payee, and if the employees or auditors of the company were likely to have had knowledge of their filing, could the returns have had any bearing whatever on the question of petitioner's intent.

3. Petitioner's final contention is that the district court erred in stating to the jury that "[s]ometimes circumstantial evidence is even more convincing than direct evidence * * *". But this instruction was entirely consistent with *Holland* v. *United States*, 348 U.S. 121, 139–140, where this Court held "confusing and incorrect" an instruction that circumstantial evidence, in order to be considered, must exclude every reasonable hypothesis other than guilt. Here, as in *Holland*, the jury was properly instructed on the standard for reasonable doubt (R. 685a–686a). The additional statement that circumstantial evidence may occasionally be more convincing than direct evidence was accurate and permissible in light of *Holland*, 348 U.S. at 140.

[2] When petitioner's counsel sought to delay the trial in order to give him an opportunity to subpoena the returns, the court denied the request because of counsel's "dereliction in not subpoenaing this a long time ago." (See the Official Typed Record, pp. 6554–6555.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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